Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-207

APPALACHIAN POWER COMPANY,
Appellant

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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September 30, 1975

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

The Appellee, Public Service Commission of West Virginia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of the State of West Virginia, on the grounds that (1) it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; (2) the decision of the case below rests on adequate non-federal grounds; and (3) Appellant has failed to exhaust its state administrative remedies.

I.

THE COMMISSION ORDER INVOLVED AND THE NATURE OF THE CASE

THE PROCEDURAL HISTORY PRECEDING THE ORDER COMPLAINED OF

This appeal raises the question of the validity of the procedure by which the Public Service Commission of West Virginia ("Commission") handed down an order on March 7, 1975, in its Case No. 8155. The Commission believes that a complete statement of the facts is necessary for an understanding of the matters herein.

For some time prior to October 1, 1974, Appalachian Power Company ("Appalachian") followed the practice of furnishing the "service entrance cable" for new residential customers having a service entrance switch with a capacity of 100 amperes or more (Tr. Case 8155, March 7, 1975, pp. 31, 33-34; hereinafter "Tr. ____ "). The "service entrance cable" is the wire running from the meter base on a residential customer's dwelling to the top of the house, where it connects with the company's aerial service drop running to the distribution pole. If the residential customer did not have a service entrance switch with a capacity of 100 amperes or more, Appalachian did not furnish the service entrance cable. However, after October 1, 1974, Appalachian, without Commission approval, changed this policy and required all residential customers to provide the service entrance cable at their own expense, regardless whether they had a 100 amphere entrance switch or not (Tr. 21, 29-30). Commercial and industrial customers have apparently always provided the service entrance cable (Tr. 31, 34-35).

Appalachian's change in policy effective October 1, 1974, will be referred to as the "service entrance cable policy."

On February 10, 1975, the Commission received a letter[1] dated February 6, 1975, from John W. Vaughan, Executive Vice-President of Appalachian, informing the Commission that Appalachian was instituting changes in its practices relating to extensions and expansion of service. (Petition for Rehearing Exh. 4, Case 7083[2]).

This letter said in pertinent part:

> **RESIDENTIAL CUSTOMERS**
>
> The company will continue to install at no cost to the customer the meter and the aerial service drop to the customer's service outlet when the distance from the utility's distribution line to the customer's service outlet is not in excess of 125 feet. All other costs associated with providing service to this class of customers shall be paid for in advance of the construction of such facilities in the form of a non-refundable contribution in the amount of investment required to construct said facilities. The investment will be calculated on the basis of the estimated cost to the company on [sic] constructing its local facilities from the adequate source of power as determined by the company.
>
> **ALL OTHER CUSTOMERS**
>
> Any customer (except residential) that requests service from the company requiring that company

---

[1]Reprinted herein as Appendix I, pp. 1a-2a.

[2]Case No. 7083 is a rate case involving Appalachian. It was during hearings on an Appalachian Petition for Rehearing in that case that the matter of changes in Appalachian's service practices was first raised, for it was in response to a Commission order entered in Case 7083 that Appalachian initiated the change in service practices.

> facilities be extended or expanded shall make payment in advance of the construction of such facilities a non-refundable contribution in the amount of the investment required to construct said facilities. The investment will be calculated on the basis of estimated cost to the company of constructing its local facilities from an adequate source of power as determined by the company and will include the installed cost of all poles, conductors, transformers, switches, protective devices, etc., required to provide adequate service to meet the customer's load requirement.
>
> The above practices are being implemented pursuant to Section "Extension of Service" of Appalachian Power Company's Terms and Conditions of Service, Original Sheet No. 4 of P.S.C. West Virginia No. 2, effective July 29, 1971.

This new policy was represented to be effective February 10, 1975, and will be referred to as the "extension and expansion policy."

On February 21, 1975, the Commission held a hearing on Appalachian's Petition for Rehearing in the rate case, Case No. 7083. The matter of Appalachian's change in its "extension and expansion policy" having come to the attention of the Commission by way of Mr. Vaughan's letter of February 6, and also by way of a multitude of complaints to the Commission (and to Appalachian) from customers affected by the change, the Commission at the February 21 hearing examined Mr. Vaughan and other company witnesses at length concerning the service connection changes (Tr. Case 7083, February 21, 1975, pp. 19-20, 118-135).

On March 7, 1975, the Commission held a further hearing in Case No. 7083 on Appalachian's Petition for Rehearing. Also on that day, it segregated the matter of

Appalachian's change in service practices by assigning it a new case number (Case No. 8155) and directed the reporter to prepare a separate transcript covering the hearing on those matters alone. On that day, there was filed with the Commission and handed to the Chairman a letter (Appalachian Exh. No. 1, Case 8155),[1] dated March 3, 1975, also signed by Mr. Vaughan, which informed the Commission that the letter of February 6, 1975, was being withdrawn, and that Appalachian had reverted to the policy in effect prior to February 10, 1975. Mr. Vaughan testified that "in those instances where we had collected monies, we set in motion a program to refund them . . ." (Tr. 17).

Thus, Appalachian *voluntarily* abandoned the February 10, 1975 extension and expansion policy by its letter of March 3, 1975, and *voluntarily* agreed to refund any monies collected pursuant thereto.[2]

Also on March 7, 1975, the Commission handed down a cease and desist order in Case 8155 directing Appalachian to "cease and desist from the practices and charges it began to make on or after October 1, 1974, which are not provided for (a) in Rule 29 of the Commission's Rules and Regulations for the Government of Electric Utilities; (b) the effective tariff sheets of Appalachian Power Company, or (c) which were not its actual practice and charges for construction, installation or change prior to October 1, 1974." The order further directed Appalachian to refund any charges already paid by its customers for such unapproved practices since October 1, 1974. Clearly, the cease and desist order and the order to refund, insofar

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[1] Reprinted herein as Appendix II, p. 3a.

[2] The Public Service Commission has been informed by Appalachian that all customer complaints arising out of the February 10, 1975 change in its extension and expansion policy have been satisfied, and that all monies collected pursuant thereto have been refunded.

as the February 10, 1975 extension and expansion policy is concerned, are now moot, Appalachian having voluntarily complied with its terms.

It is clear from the record in this case that the October 1, 1974 change in Appalachian's service entrance cable policy did not result in Appalachian's initiating "the practice of charging for certain service extensions", as suggested in the "Question Presented" section on page 5 of Appalachian's Jurisdictional Statement filed herein. Indeed, the transcript of the hearing on March 7, 1975, at page 21, records the following exchange between Appalachian's counsel and Mr. Vaughan:

> Q. Mr. Vaughan, the order of this date in this case, the cease and desist order, orders that Appalachian cease and desist in the practices and charges it began to make on or after October 1, 1974. I think in your earlier response, you made some reference to your knowledge concerning these practices and charges, but are you sufficiently familiar this morning with the practice and charges which the Commission makes reference to respond thereto?
>
> A. No, I am acquainted with the change, obviously, that took place on that date. This change did not result in the customer having to make any additional payment to the company but it did indeed result in the customer having to furnish the service entrance cable that extended from the meter base to the point of attachment at the top of the house.

At another point in the proceedings on that date, and in response to a question by Commissioner Gibson, Mr. Vaughan testified as follows:

> Well, you see, we never charged the man for the cable. We furnish that at no cost to the customer.

> The difference after October 1, is that the customer had to buy a piece of cable and perhaps in most instances pay someone for making the installation of that cable from the meters or put them up to the point of attachment at the top of the house (Tr. 29-30).

Moreover, that Appalachian did not initiate any charge for the service entrance cable on October 1, 1974, is suggested by the following language on page 6 of Appalachian's Jurisdictional Statement herein:

> Effective October 1, 1974, Appalachian changed its practice by requiring *all* customers to install at their own expense the service entrance cable. (Emphasis in original)

In view of the above stated facts and procedure in this case, it is unclear to the Public Service Commission of West Virginia exactly what Appalachian is complaining of in this proceeding. As stated, as far as the Commission is informed, Appalachian did not initiate on October 1, 1974, "the practice of charging for certain service extensions" as suggested by the "Question Presented" section of the Jurisdictional Statement filed herein. The October 1, 1974 service extension policy did not result in any charge to anyone by Appalachian. It merely required all customers to provide the service entrance cable at their own expense. Thus, the Commission order directing Appalachian to cease and desist from imposing charges for these service extensions could not apply to any charges imposed beginning October 1, 1974, because no such charges were made by Appalachian.

If Appalachian is complaining of the cease and desist order insofar as it concerns the charges attempted to be made by Appalachian as a result of the February 10, 1975 change in its extension and expansion policy, the order is

moot since, as stated, Appalachian has voluntarily agreed to abandon that change in policy and to make refunds to its customers therefor.

The "Statement" section of the Jurisdictional Statement beginning on page 5 suggests that Appalachian is complaining of the Commission's cease and desist order insofar as it relates to the service entrance cable policy. However, the cease and desist order requiring Appalachian to stop charges it began to make on or after October 1, 1974, and to refund any such charges already paid by its customers for such unapproved practices since October 1, 1974, did not and could not apply to any charges made by Appalachian with respect to the service entrance cable policy since no charges were ever made by Appalachian under that policy; likewise, no refund could be made. Obviously, the "refund" portion of the cease and desist order applied only to the February 10, 1975 policy change.

In short, the suggestion in the "Question Presented" section of the Jurisdictional Statement, and on page 10 thereof, that the Commission has unconstitutionally ordered refunds, is simply inaccurate: the February 10 refunds have been made and the issue is moot, and there are no refunds in the October 1 matter. Either the writer of Appalachian's Jurisdiction Statement is mistaken about the facts in this case, or Appalachian has changed its policy since March 7, 1975, unbeknownst to the Commission.

In any event, the gravamen of Appalachian's complaint is that it allegedly failed to receive notice and an opportunity for hearing before the March 7, 1975 order was handed down. For several reasons, the Public Service Commission of West Virginia believes Appalachian's

complaints are without merit and that this Court should grant the Commission's Motion to Dismiss or affirm.

II.

ARGUMENT

A. DUE PROCESS REQUIREMENTS HAVING BEEN MET, THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Appalachian's assertions that it was denied notice and opportunity to be heard on the question of the change of its prior practice with respect to service entrance cables is simply without merit. In fact, the matter first came to the attention of the Commission through testimony by Mr. Miller Porterfield, Vice-President of Appalachian Power Company, at the hearing on February 21, 1975, in in Case No. 7083 (Tr. 122):

> Q. Before February 10, you paid those costs yourself, isn't that right?
>
> A. That's right.
>
> Q. And how long before February—for years and years?
>
> A. Yes, sir, there's one exception that took place a couple of months ago in regard to service entrance cable when we started looking around where we could save a dollar and the promotional days were over with—we're not allowed to promote and it wasn't necessary, we stopped the service entrance cable. That's from the drop off where the point of attachment to the building is down to the meter. We used to do that, provided there was a certain condition met, but several months ago, due to our economic situation, we did make that

> change at that time about the service entrance. But other than that, we have been following the procedure for many years.

Having admitted that it instituted the October 1, 1974 change in its service entrance cable policy without notice to the Commission, Appalachian cannot complain that it did not have notice of Commission cognizance of the change. Moreover, at the outset of the hearing on March 7, 1975, *before* the cease and desist order was handed down, Mr. Vaughan was questioned concerning Appalachian's basis for its change in service practices. He indicated that Appalachian was relying solely on its tariff (Tr. 3-4). Thereafter, the Commission handed down the cease and desist order.

Neither the discussion that followed the handing down of the cease and desist order on March 7, 1975, nor Appalachian's petition for rehearing, filed March 17, 1975, nor any other pleading or paper Appalachian has filed in this case has raised any new facts that would justify the Commission's reversing its initial decision. Therefore, the Commission feels that Appalachian has been afforded ample notice and opportunity for hearing, on two occasions, on the question of the change in its service entrance cable policy. *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126 (1941).

Further, the Commission does not believe that Appalachian has been deprived of its property in any manner in this case. While it was ordered to supply the service entrance cable for qualified new residential customers on and after March 7, 1975, this was no change from Appalachian's practice prior to October 1, 1974. The March 7, 1975 order did not require Appalachian to make *reimbursement* to those customers who had been required

by Appalachian to furnish their own service entrance cable after October 1, 1974. Such question, if it arises, will be dealt with as necessary.

Appalachian has been afforded notice and a full evidentiary hearing on the matter, and no question, federal or otherwise, has been raised that would merit the plenary consideration of the United States Supreme Court.

If Appalachian is complaining that the cease and desist order was handed down prior to further discussion of the matter on March 7, 1975, the complaint has no merit. Due process does not require that the hearing in this type proceeding, where the Appellant admitted the essential fact of wrong-doing, be completed before the order is entered. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Federal Communications Commission* v. *WJR Goodwill Station, Inc.,* 337 U.S. 265, 275, 276 (1949); *Hannah* v. *Larche,* 363 U.S. 420, 440, 442 (1960); *Hagar* v. *Reclamation District,* 111 U.S. 701, 708 (1884)." *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, 895 (1961).

B. THE DECISION OF THE CASE BELOW RESTS ON ADEQUATE NON-FEDERAL GROUNDS

Chapter 24, Article 2, Section 2 of the West Virginia Code, 1931, as amended (hereinafter "Code"), states in relevant part:

> The Commission is hereby given power to investigate all . . . methods and practices of public utilities . . .; to acquire them to conform to the laws of this State and to all rules, regulations and orders of the commission not contrary to law . . . .

The commission may . . . change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism between persons and between localities and between commodities for a like and contemporaneous service. . . .

Code 24-2-7 states in relevant part:

Whenever, under the provisions of this chapter, the commission shall find any . . . practices, acts or service to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of this chapter . . . the commission shall determine and declare, and by order fix, reasonable . . . regulations, acts, practices or service, to be furnished, imposed, observed and followed in the State in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

Code 24-3-1 states in relevant part:

Every public utility subject to this chapter shall established and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public . . . and in all respects just and fair, and without any unjust discrimination or preference. All charges, tolls and rates shall be just and reasonable, and no change shall be made in any tariffs, rates, joint rates, tolls, schedules or classifications except as herein provided . . . No . . . public utility shall discontinue any . . . public service facility . . . without first obtaining authority from the commission to do so, unless the same be done under

uniform rules and regulations filed by such . . . public utility with the public service commission and approved by said commission.

The sections cited above give the Commission ample statutory authority to control the facilities, charges and services of public service corporations. "The only limitation upon this authority is that the requirements shall not be contrary to law, and that they shall be 'just and fair', 'just and reasonable' and 'just and proper'." *United Fuel Gas Company* v. *Public Service Commission*, 103 W. Va. 306, 310 (1927). The evidence is undisputed that for years prior to October 1, 1974, the company provided the service entrance cable for customers with 100 ampere entrance switches. This practice was authorized by Rule 29(b) (2) of the Commission's Rules and Regulations for the Government of Electric Utilities, which states:

Nothing contained herein shall be construed so as to prohibit a utility from making at its expense, greater extensions to its facilities than set out herein, should its judgment so dictate, provided like extensions are made to other customers under similar conditions.

On October 1, 1974, the company changed its policy by requiring all customers to provide and install the service entrance cable. There was no notice to the Commission of such change as required by Code 24-3-1, *supra*. The West Virginia Supreme Court of Appeals, in a case involving the continued maintenance of a railroad crossing, has stated:

May not a facility agreed to and continued for so many years for the accommodation of shippers be regarded as reasonable, and the continuance thereof justified? We think so, upon the principle laid

down in *State ex rel.* v *White Oak Railway Company*, 65 W. Va. 15 (1909).

Norfolk & Western Railway Company v. *Public Service Commission*, 91 W. Va. 414, 419-20 (1922).

Since Appalachian had held itself out to perform certain services for the public before October 1, 1974, it must, under the law, request authority from the Commission before discontinuing such practices. Code 24-2-2; 24-2-7; 24-3-1; Rule 29 (b), *Rules and Regulations for the Government of Electric Utilities, supra; Norfolk & Western Railway Company* v. *Public Service Commission, supra.*

C. APPELLANT HAS FAILED TO EXHAUST ITS STATE ADMINISTRATIVE REMEDIES

Appalachian is attempting to accomplish through the judicial system what it has never sought to do in a proper administrative procedure before the Public Service Commission. The company having established a long-standing practice of providing the service entrance cable for qualified new residential customers, it cannot simply change that policy without Commission approval. Rule 29 (b) (2), *Rules and Regulations for the Government of Electric Utilities, supra; Norfolk & Western Railway Company* v. *Public Service Commission, supra.* The proper method of changing such a long established procedure is to apply to the Public Service Commission for authority to do so.[1] The order complained of in no way precludes such a filing; indeed, the company was encouraged to make the application (Tr. 8-9).

[1] "No . . . public utility shall discontinue any . . . public service facility . . . without first obtaining authority from the Commission to do so, unless the same be done under uniform rules and regulations filed by such . . . public utility with the public service commission and approval by said commission." Code 24-3-1.

Accordingly, the proper forum for the resolution of this dispute is the Public Service Commission, upon proper application by Appalachian. Not only has Appellant failed to exhaust its administrative remedies, it has failed even to institute them.

CONCLUSION

For all of the above stated reasons, Appellee Public Service Commission of West Virginia urges this Court to grant its Motion to Dismiss or Affirm herein.

Respectfully submitted,

E. DANDRIDGE MCDONALD,
Attorney for Appellee
E-214 State Capitol
Charleston, West Virginia 25305

September 30, 1975

APPENDIX I

February 6, 1975

West Virginia Public Service Commission
Charleston, West Virginia 25305
Gentlemen:

Because of a serious erosion in its earnings, Appalachian Power Company does not have the financial capability to invest more funds in new construction and the revenue from its existing rates are not sufficient to meet all the cost of providing service including interest on current debt and other obligations.

The interest coverage which is necessary to sell new, long-term debt under our mortgage indenture is virtually non-existent at this time, and our financing ability was further encumbered when we learned on February 4, 1975, that the Moody's Investors Service, Inc., had downgraded our first mortgage bonds and preferred stock from "A" to "Baa" and debentures and pollution control bonds from "Baa" to "Ba." In view of this, Appalachian Power Company hereby advises the Commission that it is putting into effect on February 10, 1975, the following practices relating to extensions and expansions of service:

RESIDENTIAL CUSTOMERS

The company will continue to install at no cost to the customer the meter and the aerial service drop to the customer's service outlet when the distance from the utility's distribution line to the customer's service outlet is not in excess of 125 feet. All other costs associated with providing service to this class of customers shall be paid for in advance of the construction of such facilities in the form of a non-refundable contribution in the

amount of investment required to construct said facilities. The investment will be calculated on the basis of the estimated cost to the company on constructing its local facilities from an adequate source of power as determined by the company.

ALL OTHER CUSTOMERS

Any customer (except residential) that requests service from the company requiring that company facilities be extended or expanded shall make payment in advance of the construction of such facilities a non-refundable contribution in the amount of the investment required to construct said facilities. The investment will be calculated on the basis of estimated cost to the company of constructing its local facilities from an adequate source of power as determined by the company and will include the installed cost of all poles, conductors, transformers, switches, protective devices, etc., required to provide adequate service to meet the customer's load requirement.

The above practices are being implemented pursuant to Section "Extension of Service" of Appalachian Power Company's Terms and Conditions of Service, Original Sheet No. 4 of P.S.C. West Virginia No. 2, effective July 29, 1971.

Sincerely,

JOHN W. VAUGHAN
Executive Vice President

APPENDIX II

March 3, 1975

Honorable Brooks E. Smith, Chairman
West Virginia Public Service Commission
Charleston, West Virginia

Dear Chairman Smith:

Following the discussion on February 21, 1975, we have reviewed the policy for connecting customers and accommodating increases in loads as set forth in my letter to the Commission dated February 6, 1975.

This will advise that this letter is being withdrawn, and we shall revert to the policy in effect prior to February 10, 1975.

You will understand, of course, that this is with full reservation of all our rights under our tariffs and statutes governing our operation in the State of West Virginia.

Sincerely,

JOHN W. VAUGHAN
Executive Vice President